United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-6122

To be argued by
J. CHRISTOPHER JENSEN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6122

COUNTY OF SUFFOLK, COUNTY OF NASSAU, TOWN OF ISLIP, TOWN OF HEMPSTEAD, TOWN OF NORTH HEMPSTEAD, TOWN OF OYSTER BAY, TOWN OF HUNTINGTON, and the BOARD OF TRUSTEES OF THE TOWN OF HUNTINGTON and CONCERNED CITIZENS OF MONTAUK, INC., *Appellees,*

—against—

SECRETARY OF THE INTERIOR, ET AL., *Appellants,*
NATIONAL OCEAN INDUSTRIES ASSOCIATION, ET AL., and NEW YORK GAS GROUP, *Intervenor-Appellants.*

THE STATE OF NEW YORK and THE NATURAL RESOURCES DEFENSE COUNCIL, INC., *Appellees,*

—against—

THOMAS S. KLEPPE, Secretary of the Interior, *Appellant,*
NATIONAL OCEAN INDUSTRIES ASSOCIATION, ET AL., and NEW YORK GAS GROUP, *Intervenor-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF OF FEDERAL APPELLANTS

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INTRODUCTION

The irony of this appeal is that the appellants essentially won their case after the exhaustive evidentiary hearing in the District Court. The appellees are the disappointed parties since the District Court found that the federal appellants had complied with both "the spirit and the letter of NEPA requirements in all respects except one" (40a). What must be even more frustrating for the appellees is that they succeeded in getting the District Court to conduct exactly the kind of de novo hearing on the merits of the various scientific and social objections to the proposed sale No. 40 that is not allowed under NEPA. Ethyl Corp. v. EPA, ___ F.2d __, 8 E.R.C. 1735, 1836 (D.C.Cir.), cert. denied __ U.S. __ (1976).

Yet, even after hearing 11 days of direct expert testimony on a multitude of complex scientific and social issues, the District Court was unable to find a single inadequacy in the Government's environmental impact statements or its decision making process except for the Court's own concern over the possibility of coastal states refusing to accept pipelines and other oil-related on shore activity.

There has been considerable confusion among the parties about the appropriate review standards for this Court of both the preliminary injunction and the Sale 40 EIS. We

agree with appellee NRDC (Br. 20-21) that the broad standard appropriate for considering the preliminary injunction is whether the district judge abused its discretion or committed a clear error of law. See, e.g., Exxon Corp. v. City of New York, 480 F.2d 460 (CA2, 1973).

But in applying this general standard, this Court must recognize that its function is different for reviewing those contentions that appellees, such as the State of New York and Suffolk County, are renewing here after the district court rejected them than its function is for reviewing the single basis for the injunction on which we contend Judge Weinstein committed a clear mistake of law, thus abusing his discretion. There is a sharp procedural contrast between the district court's consideration of the State of New York and Suffolk County's issues and its consideration of our issue. Each of the County's arguments was debated in the crucible of a full trial-type hearing with extensive oral testimony from many witnesses. In reviewing those matters this Court should give added weight to the district judge's factual conclusions since credibility of witnesses obviously factored into the analysis, Chris Craft, supra, 480 F.2d at 394; Langford v. Chrysler Motors Corp., 513 F.2d 1121, 1126-1127 (C.A.2-1975).

In contrast, this Court should engage in a substantially more searching review of Judge Weinstein's declared basis for injunctive relief which we are asserting to

be erroneous. Indeed, this Court embraces an essentially de novo standard of review in determining whether a district court abused its discretion where, as here, interpretation drawn almost exclusively from documentary evidence,[1/] San Filippo v. United Brotherhood Carpenters and Joiners, 525 F.2d 508, 511 (C.A.2, 1975) and cases cited therein.

Quite obviously this Court is in as good a position as Judge Weinstein to judge whether the EIS adequately analyzed, as a matter of law, state and local land use controls and the

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1/ Appellee NRDC paints the testimony of one witness, Dr. Mitchell, in much broader terms than the record will support. Nearly all his testimony was directed to quantifying in land and water use quantities the needs of particular on shore activities associated with the development stage of an OCS project. Those calculations were essentially confirmed or rejected point-by-point by the EIS as the cross-examination revealed. At most, Dr. Mitchell was stressing that it was really the federal government, not the States, who would effectively decide the particulars of onshore activities. Only after repeated pressure on cross-examination would Dr. Mitchell concede that the "bottom line" control was that of the state and local governments. Nowhere did Dr. Mitchell or any other expert witness engage in any sort of predictions of specific state decision scenarios and the concomitant environmental impacts that NRDC claims are lacking in the EIS. The only general prediction Dr. Mitchell made, that pipeline rejections or restrictions by state/local governments might lead to the use of tankers for resource transport (J.A.346-347) is covered in detail in the Sale 40 EIS; detail to the point of discussing probable tanker size, weight and capacity and the potential quantities of oil spillage that could occur. Sale 40 EIS, Vol. II, pp. 30-32.

environmental consequences attendant on state/local rejection of such onshore facilities as pipelines. In this record the EIS and the Secretary's actions present the evidentiary basis for review of Judge Weinstein's order. The legal yardstick for measuring the adequacy of this (as it is with any) aspect of the EIS and the Secretary's actions has been clearly and simply stated by Justice Marshall in this case, New York v. Kleppe, 45 L.W. 3161, 3162 (August 19, 1976):

> * * * "the essential requirement of NEPA is that before an agency takes major action, it must have taken 'a hard look' at environmental consequences.' Kleppe v. Sierra Club, supra, at p.21 (1976) quoting Natural Resources Defense Council v. Morton,458 F.2d 827, 838 (DC Cir. 1972). In evaluating the adequacy of environmental impact statements, the courts of appeals consistently have enforced this essential requirement, tempered by a practical 'rule of reason'."[1] As the Court of Appeals for the Second Circuit has explained:
>
> "[A]n EIS is required to furnish only such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well nigh impossible." Natural Resources Defense Council v. Callaway, 524 F.2d 79, 88 (CA2-1975)."

1. See e.g. Sierra Club v. Morton, 510 F.2d 813, 819 (CA5 1975); Trout Unlimited v. Morton 509 F.2d 1276,1283 (CA9 1974); Harlem Valley Transportation Assn v. Stafford, 500 F.2d 328,337 (CA2 1974); Iowa Citizens for Environmental Quality v. Volpe, 437 F.2d 352 (CA8 1973);Natural Resources Defense Council v. Morton,458 F.2d 827,834 (DC Cir. 1972).

Consequently, as to review of the stated basis for this injunction, we agree with Mr. Justice Marshall that (45 L.W. at 3162):

> * * * "the sole question at issue is whether the District Court properly applied the controlling standards in concluding that the EIS lacked information concerning state regulation of shorelands which was 'reasonably necessary' for evaluating the project."

As to the myriad of issues now raised by appellees the State of New York and Suffolk County, this Court is only required to determine whether the district court, after extensive testimony from expert witnesses on each of the points litigated by appellees, was so clearly erroneous in rejecting the asserted contentions concerning the two impact statements and the Secretary's actions that it grossly abused its discretion.

I

IN LIGHT OF THE SECRETARY'S EXTENSIVE CONTINUING CONTROL OVER EXPLORATION, DEVELOPMENT AND PRODUCTION AND THE EXISTING STATUTORY AND REGULATORY MECHANISMS ASSURING COASTAL STATE INPUT INTO THE DECISION-MAKING PROCESS INVOLVING EXPLORATION, DEVELOPMENT AND PRODUCTION WHICH MAY OCCUR IN THE FUTURE FROM THE TRACTS OFFERED FOR SALE, THE EIS DISCUSSION OF STATE LAND USE CONTROLS, A NECESSARILY IMPRECISE PREDICTIVE VENTURE AT THE TIME OF LEASE SALE, REASONABLY APPRISES THE SECRETARY, THE PRESIDENT, CONGRESS, AND THE PUBLIC OF THE ULTIMATE CONTROL IN A GENERIC SENSE OF STATE LAND USE CONTROLS OVER ONSHORE ACTIVITIES ASSOCIATED WITH EXPLORATION, DEVELOPMENT OR PRODUCTION FROM THOSE TRACTS.

It is crucial for this Court to remember that the Secretary's regulatory authority over an OCS lessee does not end with the execution of a lease. Indeed, it is only at that point that the Secretary's control begins. The OCS Act makes that regulatory authority extremely broad and specifically includes environmental protection as a permissible basis for use of that regulatory arsenal. 43 U.S.C. sec. 1334. Each lease is expressly made subject to inter alia the provisions of the OCS Act, OCS operating orders, lease terms and stipulations, and existing and potential future regulations of an environmental nature. See, Lease Form, J.A. 1107.

The execution of an OCS lease does not itself have any environmental effect onshore or offshore. It is only the activities of the lessee in the way of exploration, development, or production from the leased tracts that has an environmental impact and so it is these activities on which an EIS must focus. The issuance of an OCS lease is certainly not the final agency action minimally required before exploration, development, or production may occur. At each of these three stages the lessee is required to submit a detailed plan of activities for approval by the federal government, 30 C.F.R. sec. 250.34. Beyond the input the coastal states have into this plan approval process (discussed infra), the federal government conducts an environmental impact analysis */ of each plan submitted and may decide after that assessment that a full environmental impact statement will be prepared prior to acting on the plan.

We certainly do not mean to imply, however, that the current EIS for the sale and execution of leases can ignore the existence of coastal state land use controls because the onshore activities subject to those controls can only occur after a federal approval at some future date which itself will

*/ Such an assessment is at least required by this Court. See, Hanly v. Kleindienst, 471 F.2d 823 (1972); Hanly v. Kleindienst, 484 F.2d 484 (1973).

be assessed from an environmental viewpoint. An EIS must be a predictive document to the extent of reasonable forecasts based on presently available meaingful information, Scientists Institute for Public Information v. AEC (SIPI), 481 F.2d 1079, 1094, 1096 (C.A.D.C. 1973). Yet by the same token, such forecasting can pass the point of reason and become merely meaningless "crystal ball" inquiry. Such is not required of an EIS, SIPI, supra, 481 F.2d at 1081. It is the balancing of reasonable projection against crystal ball conjecture that is involved in the NEPA standard of review -- a hard look at environmental consequences tempered by a rule of reason. State of New York v. Kleppe, 45 L.W. 3161, 3162 (August 19, 1976)(Marshall, J.); Kleppe v. Sierra Club, 44 L.W. 5104, 5110 n. 21 (June 28, 1976); NRDC v. Callaway, 524 F.2d 79, 88 (1975).

Factors such as the present foreclosure of future environmental decision options versus the degree of logical environmental divisibility of present actions from future decisions weigh significantly in assessing the adequacy of the predictive aspect of an EIS. Naturally, "*** the kind of impact statement required depends upon the kind of 'federal action' being taken." Kleppe v. Sierra Club, supra, 44 L.W. at 5107 n. 14; Aberdeen & Rockfish R. Co. v. SCRAP, 422 U.S. 289, 322 (1975). It is the agency's primary right to determine the appropriate time and context of the environmental analysis of such potential

federal actions as are beyond the immediate proposal. Kleppe, 44 L.W. at 5110. This determination, reviewable solely for arbitrariness, requires a discretionary weighing by the agency of such factors as "*** the extent of the interrelationship among proposed actions and practical considerations of feasibility." Id. Indeed, "Even if environmental interrelationships could be shown to extend [beyond the scope of the immediate action] practical considerations of feasibility might well necessitate restricting the scope of comprehensive statements." 44 L.W. at 5111.

In the different factual context of one of a series of ocean dumping activities, this Court has summarized these principles most succinctly stating, NRDC v. Callaway, 524 F.2d 79, 88 (1975):

> A government agency cannot be expected to wait until a perfect solution of environmental consequences of proposed action is devised before preparing and circulating an EIS. On the other hand, an agency may not go to the other extreme of treating a project as an isolated 'single shot' venture . . .

In the factually distinct context of OCS oil and gas leasing, this Court must recognize in applying the "hard look - rule of reason" standard that the total OCS project (from leasing until production is complete) is a continuously controllable and thus easily divisible project, NRDC v. Morton (MAFLA), 510 F.2d 813, 824 (C.A. 5, 1975).

On such subjects as the effect on the aquatic environment and the coastal areas and activities of drilling mud discharges, formation water effluents, chronic low level oil spills, massive oil spills, drilling and production platforms, and operational and support activities the present EIS can make reasonable predictions based on quantifiable discrete experience. Such scientific facts are transferable from prior OCS activities to the Mid-Atlantic context. But projecting in precise terms the potential decisions of Mid-Atlantic coastal state/local governments at least three years in the future (as the district court found from the EIS, 86-a) is not presently possible in either a quantitative or qualitative fashion. Indeed, appellees concede as they must that the subjective of state control over onshore activities is discussed in a general way in the Sale 40 EIS. Their complaint is with the amount of the discussion and the degree of its precise prediction. */

*/ NRDC distorts the EIS in attempting to explain away that document's discussion of the particular point seized upon by Judge Weinstein. While the EIS speaks for itself we wish to highlight here three passages from the 61 page description of the proposal commencing the 2000 page EIS. These passages state (emphasis added):

> * * * the types of development permitted in the coastal zone, including any that might be associated with offshore oil and gas operations in the event this proposed sale is held, can ultimately be broadly controlled by the states. [Sale 40 EIS, Vol. I. p. 40]

[footnote continued on next page]

[continuation of footnote]

> In addition to the States' coastal zone management programs, existing State laws regulating or controlling development, facility siting, and emission levels have application to the coastal zone. As such, any OCS-related facility development in the coastal zone would be subject to these regulations. [Sale 40, EIS, Vol. I, p. 50]
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> * * * * * *
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> The siting of any onshore OCS-related facilities in the Mid-Atlantic area would be subject to the planning mechanisms and controls [of State and local governments] discussed above. [Sale 40 EIS, Vol. I, p. 61]

The other passages cited in our opening brief (p. 16 n.5) discuss (1) the variety and state-by-state nature of coastal activities control such as outright prohibitions, regulation, permits, impact statement requirements, and zoning and subdivision controls; (2) alternative resource transport mechanisms (tankers v. pipelines); (3) the environmental impacts of such alternative mechanisms; and (4) established and projected future statutory and regulatory procedures for assuring state/local input into such future decisions. This discussion directly answers Judge Weinstein's concern that the Secretary acted on the basis of a "material error or assumption regarding the environmental impact," because the EIS had not "brought home to him" what means of transport the coastal states "would sanction." (J.A. 76, 77, 81)

But it is exactly this sort of specific scenario posturing which is not required under the "hard look-rule of reason" standard in an EIS assessing this first step in a continuously controllable total OCS project. It is really unnecessary crystal ball inquiry at this time; no decisional options relating to activities affecting near-land and coastal land areas are foreclosed by the leasing action itself. Far from ignorance, the Secretary acted with a general knowledge of the breadth and depth of state land use controls. To require more EIS specificity at this initial stage this Court would force the Secretary, "*** to wait until a perfect solution *** is devised," a requirement already rejected in NRDC v. Callaway, supra, 524 F.2d at 88.

Such inquiry becomes more meaningful only in the stages which follow leasing, the three broad OCS activities, exploration, development, and production. There is ample opportunity for more detailed inquiry and coastal state input before any lessee actions on each of these stages can begin. As noted above, the lessee is required to submit a detailed plan for federal approval before any activity can be undertaken at each stage. 30 C.F.R. 250.34. Judge Weinstein was clearly in error when he intimated that the lessees could proceed immediately upon the execution of leases to begin onshore support activities (84-a). If that were to take place, the lessee would violate 30 C.F.R. 250.34 and his lease would

be subject to cancellation under its terms (1109-a; lease section 10).

Although significantly the district court recognizes that environmental impacts will not occur until "a strike is made," (84-a), Lease Stipulation No. 7 (1092-a) nevertheless requires the lessee to submit precise information to coastal states detailing any projected onshore aspects of the exploration process and affords those states the opportunity to comment to the federal government on the exploration plan in advance of its approval.

At the stage where onshore impacts are the greatest, the development stage which won't begin for at least three years after leasing (Opinion, 86-a), detailed information about development must be submitted to the coastal states for review even a month before the development plan may be sent to the federal government. The federal government must provide at least two additional months for state comments. See 30 C.F.R. 250.34(b) and (c), reprinted at Sale 40 EIS, Vol. III, p. 786-788.

At both of these points, as noted above, there is a much greater opportunity to assess the environmental consequences of various state controls in a more precise manner since it is not until that time that the coastal states are likely to take definite positions on onshore activities.

Moreover, as the EIS discussed at some length, the coastal states will most likely have federally-approved coastal zone management programs before development or production plans are submitted. Once those programs are approved, the new state certification procedure, Section 307(c)(3)(B), 16 U.S.C. sec. 1456(c)(3)(B), will apply to federal approval of exploration, development, and production plans. */ That certification procedure will strengthen the states' input on plan approval significantly.

In light of this continuing control over the later stages of a total OCS project when the actual environmental impacts will occur and when there is ample leeway for the Secretary to adjust the project to deal with those impacts, the present EIS discussion satisfies the "hardlook-rule of reason" standard. As stated in MAFLA, supra, 510 F.2d at 827-828, in OCS leasing "developers sign leases and conduct separable operations over a period of months and years, and . . . restrictions in those leases give the agency the ability to constantly control and adjust future action." The Secretary's, " *** continuing

*/ While the district court correctly held that leasing need not await formal approval of state programs (62-a), the court improperly implies that the state certification procedure would apply to the action of leasing after program approval, (50-a). As the language of Section 307(c)(3)(B) and the legislative history (discussed by NOIA) make clear, the lease action itself is not subject to the certification procedure.

control must be considered in determining the reasonableness of the impact statement" and "the agency's continuing opportunity for making informed adjustments has a major effect upon our evaluation of the sufficiency of the materials contained in the EIS itself." The court also observed that under Interior's OCS procedures, including the Secretary's authority "*** to suspend operations under existing leases whenever he determines that the risk to the marine environment outweighs the immediate national interest in exploring and drilling for oil and gas," the "*** shortcomings in a major federal action can be corrected or minimized when and if they surface," 510 F.2d at 828.

To apply the characterization the district court applied to all other aspects of the EIS (41a):

> In short, the process worked well to insure that the possible consequences of this major action in opening areas off our most populated coasts to oil and gas production was fully debated, open to political veto, and considered in depth by the Secretary and his staff as well as by other units of government.

In this case the Secretary and the public were apprised of coastal state controls and the impacts that might flow from a state prohibition of pipelines. Congress was obviously aware of ultimate state control as exemplified by its coincident enactment of amendments to the Coastal Zone Management Act. The President certainly was also aware of state controls and the proper time to consider them in precise terms. As the

President's Council on Environmental Quality has noted in its Sixth Annual Report (Dec., 1975), page 160: "The best time to plan for the onshore impacts of oil development is at this point -- after exploration has shown where the oil is and how much is there."

II.

THE DISTRICT COURT's PRELIMINARY INJUNCTION MAY NOT BE REINSTATED BECAUSE APPELLEES HAVE FAILED TO ESTABLISH ANY IRREPARABLE INJURY

We have already shown that the underlying legal premise of Judge Weinstein's order is clearly erroneous and unsupported by any record evidence. However, even if the legal basis for the issuance of the preliminary relief were sustainable, the District Court's order could not be reinstated for the sole reason that the appellees have made no showing whatsoever of imminent irreparable injury. A prior panel of this Court granted appellants' motions to stay the order of the District Court because in the Court's terms:

> In determining the propriety of a preliminary injunction, a major factor for consideration is whether irreparable harm will result or be avoided. We find nothing in this case which satisfies us that the August 17, 1976 sale, in and of itself will cause appellees any irreparable injury. On the other hand, the national interests, looking toward relief of this country's energy crisis, will be clearly damaged if the proposed sale is aborted.
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> * * *
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> As Judge Weinstein pointed out in this case, "Most expert opinion on the lead time between exploration and production estimates that there will be three years of exploration at a minimum before production activity can begin." (210a-211a)

Although this decision was rendered in an expedited manner without consideration of the full record below. the panel did have copies of the sale 40 EIS available for review and also had the benefit of relatively extensive briefs and oral argument on the issue of irreparable harm and the correctness of the District Court's view of the merits of appellees' actions.

In addition, the appellees immediately applied to Supreme Court Justice Thurgood Marshall for an order vacating this Court's stay and Justice Marshall also considered the appellate briefs as well as heard extensive argument in his chambers. Justice Marshall declined to vacate the stay in a substantial written decision in which he concluded:

> [T]he Court of Appeals concluded that plaintiffs would not irreparably be injured if the Secretary were permitted to open the bids. I cannot say that the court abused its discretion. It is axiomatic that if the Government, without preparing an adequate impact statement, were to make an "irreversible commitment of resources," National Resources Defense Council v. NRC, Nos. 75-4276, 75-4278, Slip Op. at 3934 (CA2, May 26, 1976) a citizen's right to have environmental factors taken into account by the decision maker would be irreparably impaired.
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> * * *
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> In the instant case, however, the Court of Appeals apparently decided that the opening of the bids does not constitute an "irreversible commitment of resources." I am unprepared to say that the court was wrong in so holding. (216a-217a)

Thus, we submit that the appellees' failure to establish any irreparable injury is, in effect, the law of this case and should not be overturned absent some extraordinary new showing by appellees of harm or "irreversible commitment of resources" that was not made to the prior panel of this Court.*/ We simply do not believe that appellants can make such a showing in view of the fact that one of the appellees' own experts testified below that an oil strike is not likely to occur, if ever, until at least one year after issuance of the leases (298a-299a) and development will not likely occur for at least three years (425a).

First, the OCS lessees must prepare and submit an exploration plan to the Mid-Atlantic oil and gas supervisor employed by the United States Geological Survey for his approval. (Lease stipulation No. 7, 1092a). Even before this plan can be submitted, a special stipulation in the oil and gas lease requires the submission of a detailed notice of proposed onshore facilities for the exploratory phase to the Mid-Atlantic coastal states for their information, review, and comment prior to approval of the exploration plans (Id.).

It is well settled that a showing of immediate irreparable injury is an absolute prerequisite for issuance of a preliminary

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*/ See the Brief of Federal Appellants, p. 24, Fn. 14.

injunction. Doren v. Salem Inn, Inc., 422 U.S. 922, 931 (1975). The appellees cite this Court's decision in Sonesta International Hotels Corp. v. Wellington Associates, 483 F.2d 247, 250 (2d Cir. 1973) for the proposition that they must only make a showing that the "balance of hardships" tips decidedly in their favor to obtain preliminary relief. However, the Court has unequivocally stated that even the balance of hardships test "does not eliminate the basic obligation of the plaintiff to make a clear showing of the threat of irreparable harm [that] ... is a fundamental and traditional requirement of all preliminary injunctive relief. (emphasis added) Triebwesser & Katz v. American Tel. & Tel. Co., 535 F.2d 1356, 1359 (2d Cir. 1976).

Even assuming the de minimis environmental hazards associated with exploratory drilling are sufficient to pose a threat of irreparable harm to the appellees, the District Court would have more than ample time to hear and decide the few remaining issues in this litigation and render final judgment accordingly. If that final judgment entails injunctive relief against the federal appellants pending further environmental studies, such relief could be applied to approval of exploration plans, thereby insuring that no environmental damage is done until the NEPA requirements are fully satisfied.

We submit that the District Court would have been completely justified in consolidating the lengthy hearing on

the preliminary injunction with the trial on the merits pursuant to Rule 65(2) of the Federal Rules of Civil Procedure and rendering a final judgment accordingly. A review of the record indicates that the appellees were given an unlimited opportunity to adduce evidence on the issue of the federal appellants' compliance with NEPA. The only evidence offered by the appellees that was not admitted into evidence was evidence that the court excluded on relevancy grounds.

Thus, it may even be appropriate for the litigation in the District Court to be finally resolved by motions for summary judgment -- a process that could most probably be completed before any exploration activity begins on the leased tracts. Indeed, the only issue remaining to be tried is the narrow issue upon which the District Court granted a preliminary injunction. Since the issue was developed sua sponte by the District Court judge and was never advocated by the appellees or really addressed by the expert testimony, it may be appropriate for this action to be remanded to the District Court so all parties have an opportunity to present evidence on the extent to which the Secretary of the Interior took into account the coastal state land use controls in relation to the environmental impact of lease sale No. 40. Justice Marshall suggests such a procedure at Footnote 3 of his opinion:

> In the instant case, it is possible before the bids are accepted the District Court will decide that the defect in the EIS has been remedied by a supplemental affidavit prepared by the Secretary in response to the court's opinion. That affidavit was presented to the Court of Appeals as an appendix to the Government's brief; it was also presented to me, but because it had not yet been given to the District Court, I declined to consider it. I was informed at argument, however, that the affidavit discusses the extent to which the Secretary considered the possibility of lack of state cooperation in making his decision to approve Sale No. 40. (217a).

There is virtually no possibility of injury to these appellees for at least one year which is more than sufficient time for this action to be determined on the merits by the District Court. If the appellees feel threatened injury by further steps taken by the federal appellants at some future opportunity, they may always renew their motion for preliminary relief, assuming that the action has not yet proceeded to judgment. Given the prior ruling of this Court that appellees suffer no imminent irreparable harm from the lease sale and the possibility that this action may be expeditiously determined by the District Court, the order granting a preliminary injunction must be reversed.

The appellees have argued in their briefs that this Court should fashion an amended remedy that would enjoin execution of the lease or, to the extent leases have already been executed, would invalidate those leases. Even if this Court were to affirm

the District Court's legal analysis, there would be no reason to invalidate or to enjoin execution of the leases. As argued above, there are numerous subsequent steps in the OCS lease process which could be the subject of future environmental study and even the preparation of environmental impact statements. Indeed, it will only become relevant to study the effect of coastal land use controls on on-shore development at some later time when it is actually known how much recoverable oil and gas exists in the lease area, if any, and where the reserves are located.

In fact, the District Court was explicitly concerned with the method of transportation and processing oil that is unlikely to occur for several years. The District Court did not find that alternatives to sale 40 were not adequately explored or that the project was so environmentally defective that it had to be abandoned. On the contrary, the Court was fully prepared to allow the lease sale and the subsequent development to expeditiously proceed:

> Finally, considerations of state law and policy as it affects the Sale 40 program can be accomplished speedily. If the Secretary decides, after considering this factor in the light of all other NEPA materials to proceed with Sale 40, he may do so. (87c)

Given this view, the District Court's finding of a kind of presumptive irreparable injury to the appellees is illogical. It is also inconsistent with the District Court's recognition of the national and, particularly, regional importance of developing the Atlantic oil and gas reserves as quickly as possible (15a-17a). As to the regional natural gas shortage alone, the Court concluded that it was approaching crisis proportions:

> ... [T]here is a growing shortage of natural gas which has resulted in cutting off supplies for industrial uses and which even threatens imminent cut-off of cooking and heating fuels in homes. The cost and availability of energy will, unless it is rectified, further disadvantage this region's relative ability to generate jobs, leading to further economic and social declines.

The District Court's argument that a finding of a NEPA violation constitutes an irreparable injury ipso facto is simply not true. This Circuit and others have recognized that even in NEPA cases the issuance of a preliminary injunction does not automatically follow upon a showing of a NEPA violation where the equities favor the Government. Conservation Society of South Vermont, Inc. v. Secretary of Transportation, 508 F.2d 927, 933-34 (2d Cir. 1974); Environmental Defense Fund, Inc. v. Froehlke, 477 F.2d 1033 (8th Cir. 1973).*/

*/ In Kleppe v. Sierra Club, 44 L.W. 5104, 5109 (June 28, 1976), the Court specifically rejected the D.C. Circuit's conclusion that the harm justifying an injunction matured whenever an impact statement is due and not filed. The same rejection of this harm per se argument applies equally here.

Finally, we note our concurrence with the views expressed by our co-appellant NOIA as to the chaos that would ensue from invalidation of the leases. To restate a sealed bidding lease sale of this magnitude would drastically undermine the fairness and effectiveness of the bidding since the precise valuation of the competing bidders is now known for each of the 154 tracts offered for leasing. The very purpose of the federal secret bidding procedures would be seriously compromised.

Any invalidation of leases would also turn this litigation into a procedural quagmire since many of the companies entering into leases are not party to this litigation and are not represented by either NOIA or the New York Gas Group. There is a serious question as to whether the leases of these parties could be affected without in some way making them parties to the litigation.

Finally, of course, invalidation of the leases would be completely in violation of the Outer Continental Shelf Lands Act, 43 U.S.C. §§1331 et seq., which provides the sole basis for determining the validity of OCS leases. Union Oil Co. v. Morton, 512 F. 2d 743 (9th Cir. 1975); Gulf Oil Co. v. Morton, 493 F.2d 141 (9th Cir. 1973). It is clear that NEPA does not vest this Court with authority to exceed the jurisdictional limitations of a pre-existing statute. Aberdeen & Rockfish R.R. v. SCRAP, 422 U.S. 289 (1975); U.S. v. SCRAP, 412 U.S. 69 (1973); Kitchen v. FCC, 464 F. 2d 801 (D.C. Cir. 1972).

We respectfully submit that the District Court's findings of the sole NEPA violation is clearly erroneous and must be reversed by this Court. If, however, this Court should not agree, there is absolutely no basis to reinstate preliminary relief against the appellants because the appellees have failed to establish any imminent irreparable injury and because the overruling national interests mandate that the OCS leasing activities proceed immediately.

CONCLUSION

It is respectfully submitted that the decision and order of the District Court granting a preliminay injunction under NEPA should be reversed and that the actiсn be remanded for trial on the merits.

Respectfully submitted,

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(Of Counsel)

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss.:

Sally Reese, being duly sworn says that on the 24th day of September, 1976, I deposited in a Depository for Mailing, in the United States Courthouse, located at 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, "APPELLANTS' REPLY BRIEF",

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of which the annexed is a true copy contained in a securely enclosed postpaid wrapper, directed to the persons hereinafter named, at the addresses stated below:

To:

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Sworn to before me this
24th day of September, 1976.

Sally Reese
Sally Reese

Cyril Hyman

CYRIL HYMAN
Notary Public, State of New York
No. 30-[illegible]
Qualified in Nassau County
Commission Expires March 30, 197[illegible]